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Supreme Court, U.S.
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In The

Supreme Court of the United States

TROY ANTHONY DAVIS,

Petitioner,

v.

WILLIAM TERRY, Warden, Georgia Diagnostics Prison,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

No court has examined Petitioner Troy Davis' compelling new evidence to determine if he is innocent. The Court of Appeals for the Eleventh Circuit affirmed the district court's refusal to examine Petitioner's evidence of innocence. If believed, the post-trial affidavits of numerous witnesses show that constitutional violations led to the conviction of an innocent man. In violation of this Court's precedent, no court has assessed the credibility of Mr. Davis' new evidence that underlies both his innocence and constitutional claims.

The question presented is:

> Can a habeas court avoid its role as a fact finder in substantial innocence cases by skipping the innocence "gateway" inquiry and ruling on a petitioner's constitutional claims when the innocence and constitutional issues arise out of the same facts?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Troy Davis respectfully petitions for a writ of certiorari to review the opinion of the Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, App. 1, is reported at 465 F.3d 1249.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the Eleventh Circuit was entered on September 26, 2006. *See* App. 1. The Court of Appeals for the Eleventh Circuit denied Mr. Davis' Petition for Rehearing and Petition for Rehearing e*n banc* on December 13, 2006. *See* App. 2. This Court previously granted Petitioner an extension of time to file a petition for writ of certiorari up to and including April 12, 2007. *See Troy Anthony Davis v. William Terry, Warden*, No. 06A824 (Thomas, J., in chambers) (Aug. 25, 2006). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution Article I, Section 9, clause [2], states, in relevant part: "The privilege of the Writ of Habeas Corpus shall not be suspended."

The Fourteenth Amendment of the United States Constitution states, in relevant part: "Nor shall any State

deprive any person of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that --

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

INTRODUCTION

The Court of Appeals' decision presents an important question concerning the federal courts' role as fact finders in the disposition of capital cases involving actual innocence.

With the advent of DNA testing methods, the possibility of wrongful executions has been reduced and the causes of wrongful convictions have become evident. Most convictions of prisoners later found to be innocent have resulted from eyewitness misidentification, false confession, and perjury. *See Kansas v. Marsh*, 126 S. Ct. 2516, 2545 (2006) (SOUTER, J., *dissenting*). Petitioner's case is a classic example of the unreliability of eyewitness testimony.

Both the State and Petitioner agree that the murder was committed by one of two men: Petitioner or State witness Sylvester Coles in a dimly-lit parking lot in the dark, early hours of the morning. New evidence has come to light that questions the core of the State's case in the form of eyewitness recantations, questionable police tactics and evidence from multiple affiants that State witness Red Coles committed the murder. Yet, no court has ever examined Petitioner's new evidence to determine if he is innocent.

The number of DNA exonerations averaged twenty per year between 2000 and 2003[1] and there is no reason to believe that the rate of wrongful convictions is lower in cases where DNA evidence is not available. When DNA evidence is not available, as it is not in this case, habeas courts must resort to more judicial assurances of guilt by examining new evidence that has come to light since trial and testing its credibility. Since not all cases involve forensic evidence, habeas courts must fulfill their duties as fact finders when petitioners present substantial non-forensic evidence of innocence. In this case, however, the lower courts conducted no examination of Petitioner's innocence. Allowing the Court of Appeals decision to stand creates two standards of review, one for petitioners that can show innocence through scientific evidence and a separate standard for those petitioners who can show innocence only through testimonial evidence. The Court of Appeals opinion allows courts to avoid their fact-finding function imposed by this Court's habeas jurisprudence in substantial innocence cases.

This Court should grant certiorari to consider whether habeas courts may bypass the "gateway" innocence issue in cases with substantial evidence of innocence or remand to the

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[1] *See* Gross, Jacoby, Matheson, Montgomery, & Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & C. 523 (2006).

Court of Appeals with direction to reconsider in light of this Court's innocence "gateway" jurisprudence. *See House v. Bell*, 126 S. Ct. 2064 (2006); *Schlup v. Delo*, 513 U.S. 298, 315 (1995).

STATEMENT OF THE CASE

Petitioner appeals the denial of his petition under 28 U.S.C. § 2254 for a writ of habeas corpus.

In the early morning hours of August 19, 1989, Officer Mark McPhail was murdered in a parking lot in Savannah, Georgia. The incident started when Sylvester "Red" Coles began harassing a homeless man for a beer while Petitioner and others watched quietly from a distance. Coles verbally harassed and chased the homeless man to a nearby parking lot where the victim Officer McPhail was working. Coles threatened the retreating homeless man by exclaiming: "You don't know me. Don't walk away from me. I'll shoot you." Petitioner and others silently followed the scuffle. During the altercation, the homeless man was struck on the head with a pistol and yelled for the police. Officer McPhail responded and was shot dead with a .38 caliber weapon by the same man who had pistol-whipped the homeless man. The parking lot was dark and the scene was chaotic. After the dust settled, the police took the statements of several onlookers but had no suspects.

The next day, Red Coles and his attorney approached the police to exonerate Coles and identify Petitioner as the shooter. Mr. Coles did not mention that he had been carrying a .38 caliber gun -- the same caliber as the murder weapon -- on the night of the shooting. After Coles' self-interested revelation, the Savannah police never questioned Coles' involvement. The police never searched Coles' house for the murder weapon, never included Coles' picture in witness

photo spreads and paraded Coles in front of four State witnesses as a mere bystander in a crime scene "reenactment."[2]

A jury convicted Petitioner of murder, aggravated assault, obstruction of a law enforcement officer and possession of a firearm during a felony and sentenced him to death. The State's case rested on the testimony of several eyewitnesses, including Red Coles. Several trial witnesses identified Petitioner as the shooter in a photo line-up that did not include the pictures of Coles or anybody else at the scene. Other witnesses identified Petitioner at trial two years after the shooting and after extensive publicity.

Following his state direct appeals and collateral review, Mr. Davis filed a petition for writ of habeas corpus in 2001. Mr. Davis has submitted twenty-one affidavits to the district court that show (1) that Red Coles, and not Petitioner, shot officer McPhail; (2) the State withheld cumulatively material evidence from Mr. Davis in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and (3) that the police testified falsely and knew that witness testimony was false, in violation of *Giglio v. United States*, 405 U.S. 150 (1972).

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[2] Despite the evidence against Coles, the police conducted a crime scene reenactment with Coles and four witnesses. During the reenactment, Coles played the part of a passive onlooker to the shooting. After the reenactment, the police asked two reenactment participants (State witnesses Harriet Murray and Dorothy Ferrell) to pick out the shooter from a photographic line-up which did not include a picture of Red Coles. Both witnesses identified Mr. Davis in the photographic line-up and again at trial. The remaining two witnesses at the reenactment, D.D. Collins and Larry Young, also implicated Petitioner at trial. In post-trial affidavits Collins, Ferrell and Young have all recanted their trial testimony, citing overly suggestive or intimidating police tactics; Murray has contradicted her testimony and implicated Red Coles.

No court has ever examined the full panoply of new evidence to determine if Mr. Davis is innocence. Four new witnesses have now implicated Coles, not Petitioner, in the murder of Officer McPhail. One eyewitness has come forward to testify that he was near the crime scene and saw Red Coles shoot McPhail, another three witnesses have stated that, since trial, Red Coles has bragged about killing Officer McPhail and escaping punishment.

In addition to the new evidence that implicates Coles, all of the State witnesses who testified against Petitioner -- save Red Coles and an eyewitness who disappeared after trial -- have recanted or contradicted their trial testimony. In fact, the only remnants of the State's case against Petitioner are the self-serving testimony of Red Coles and a questionable courtroom identification of Mr. Davis two years after the incident by Steven Sanders.[3]

The prosecution's case at trial relied on several witnesses who saw the assault of Larry Young, the murder of Officer McPhail or both. The State highlighted the testimony of two witnesses who told the jury that Troy Davis confessed to shooting Officer McPhail. Both of those witnesses have recanted. At trial, the State exclaimed that "every witness who saw only the beating of [the homeless man] Larry Young" said that Troy Davis did it. All of those witnesses – save Red Coles – have now recanted. At trial, the State told the jury that "every witness who saw only the shooting of Officer McPhail" identified Troy Davis as the shooter. That witness has recanted. At trial, the State told the jury that

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[3] As of the date of this petition, Petitioner's counsel has been unable to interview Mr. Sanders. Sanders' police statement on the night of the shooting states that he would not "recognize the shooter" contradicted his testimony two years later when he identified Mr. Davis for the first time at trial.

"every witness who saw both the assault on Larry Young and shooting of Officer McPhail say that the same guy did them both" and identified Troy Davis as the perpetrator. All of those witnesses – save Steven Sanders – have recanted or contradicted their trial testimony.

No court has ever reviewed any of this evidence to determine if Petitioner Davis is innocent. Instead, the district court and the Court of Appeals ignored the innocence "gateway" process established by this Court and evaluated Petitioner's constitutional claims on an incomplete record.

REASONS FOR GRANTING THE PETITION OR REMANDING TO CONDUCT AN INNOCENCE ANALYSIS

Allowing the Court of Appeals opinion to stand permits habeas courts to overlook even the most "extraordinary" cases of innocence. Had the lower courts examined Petitioner's extensive innocence evidence, as required by this Court, the constitutional deficiencies of Petitioner's trial would have become evident.

This Court's decisions make plain that credible claims of innocence cannot be ignored.

(A) Innocence plays an integral role in the amount of scrutiny habeas petitions receive. The Court's invocation of innocence as the "gateway" question for otherwise-barred constitutional claims ensures that the innocent receive proper attention and that non-meritorious claims do not consume scarce judicial resources. The lower courts' bypass of the innocence gateway grants the same cursory review to both the "extraordinary case" as it does the ordinary.

(B) This Court's opinion in *House v. Bell* shows that the gateway innocence inquiry requires that habeas courts thoroughly examine innocence evidence and make credibility determinations. The habeas court abandoned its role as fact finder by refusing to address Petitioner's innocence evidence.

(C) Had the habeas court fulfilled its role as fact finder, Petitioner would have shown that "a constitutional violation probably resulted in the conviction of an innocent man."

A. Innocence Plays an Integral Role in the Amount of Scrutiny Habeas Petitioners Deserve

The lower courts erred by ignoring Petitioner's innocence evidence. A habeas court must review a petitioner's innocence evidence before it may address the merits of procedurally defaulted constitutional claims. *Schlup v. Delo*, 513 U.S. 298, 315 (1995). This Court has gone to great pains to balance the "quintessential miscarriage of justice" of executing an innocent man with the societal interests of finality, comity and the conservation of scarce judicial resources. *Id.* at 324-5. In striking such a balance, the Court has outlined a two-step process for determining whether a petitioner is entitled to review of procedurally barred constitutional claims because he is innocent.

The first "gateway" step requires that a petitioner establish his innocence under *Schlup's* gateway standard: "that in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* 327. If petitioner cannot establish his innocence, habeas relief is barred. Only the "truly deserving" habeas petitioner who can establish his innocence may reach the second step -- review of his

defaulted constitutional claims. *Id.* at 321. The *Schlup* innocence "gateway," recently reaffirmed by this Court, "ensures that a petitioner's case is truly extraordinary while still providing the petitioner with a meaningful avenue to avoid manifest injustice." *House v. Bell*, 126 S. Ct. 2064, 2076 (2006).

The district court and the Court of Appeals below bypassed the gateway issue of innocence and ruled on Petitioner's constitutional claims. Although the court acknowledged that Petitioner's innocence is the "threshold issue" under *Schlup*, it affirmed the district court "in declining to consider evidence of his actual innocence." *Davis v. Terry*, 465 F.3d 1249, 1253 (11th Cir. 2006). The Court of Appeals therefore ignored innocence evidence and proceeded to undergo a cursory examination of the merits of Petitioner's constitutional claims.

The Court of Appeals' reprioritization of judicial resources without regard to a petitioner's innocence threatens the delicate balance this Court has struck. *Schlup's* innocence gateway was meant to serve as a screen to conserve judicial resources for "those who were truly deserving." 513 U.S. at 321. Instead, the court reviewed Petitioner's claims without reference to whether his case was the "rare," "extraordinary case." *Id.* As a result, Petitioner received perfunctory review of his constitutional claims without the benefit of the fact-finding and credibility assessments required to make a *Schlup* innocence gateway determination. If the lower court's decision is accepted, the truly "exceptional" innocence cases that do not involve DNA evidence will be lumped together with non-meritorious masses, negating *Schlup's* insistence on justice for the innocent.

B. The Gateway Innocence Inquiry Requires That Habeas Courts Thoroughly Examine Innocence Evidence and Make Credibility Determinations

This Court's recent decision in *House v. Bell* underlines the importance of innocence determinations in capital habeas corpus cases. In *House*, decided last summer, the petitioner asserted his innocence as a gateway to his defaulted constitutional claims of ineffective assistance of counsel and prosecutorial misconduct. 126 S. Ct. at 2075. This Court engaged in extensive analysis of the innocence evidence and overruled the district court's factual findings, holding that House satisfied the *Schlup* innocence gateway standard. *See id.* at 2079-86. Although the district court had conducted an extensive evidentiary hearing and concluded that House was not innocent, this Court was compelled to scrutinize the State's forensic and testimonial evidence and make its own factual and credibility findings. *Id.* This Court's argument transcript and decision read more like trial briefs than Supreme Court records, with an examination of the innocence evidence uncharacteristic of an appellate court.[4]

This Court's reexamination of House's innocence evidence emphasized that the lower courts must take seriously

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[4] Samples of questions posed and answered by this Court included: Did the blood on House's pants really belong to the victim? If it was the victim's blood, did the lab reports prove that it was not spattered during the assault? How much autopsy blood was missing from the test tubes? When did it go missing? How close to the button of House's pants was one speck of blood? Were the witnesses who heard the victim's husband confess credible? Was the victim's husband's testimony credible? *See House v. Bell* Transcript at 7, 14, 15; 126 S. Ct. at 2079-85.

their roles as fact finders of last resort in innocence cases. The Court's unusual lack of deference to a district court's factual findings was not a result of the lower court's "clear error" or House's overwhelming innocence. As the Court stated, the Court was merely "uncertain" as to the basis of some of the habeas court's findings and House's innocence was "close" and not "a case of conclusive exoneration." *Id.* at 2078; 2086.

This Court's insistence in *House* that habeas courts analyze the facts of innocence cases and assess the credibility of new evidence is not new precedent. In *Schlup*, the Court held that "in the context of a request for an evidentiary hearing . . . the District court *must* assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." *Schlup*, 513 U.S. at 331-332 (emphasis supplied). The dissent in *House*, although dismayed by the majority's departure from standard appellate review, stated that "the point in *Schlup* was that ... the district court had to assess the probative force of petitioner's newly presented evidence by engaging in fact finding rather than performing a summary judgment-type inquiry." *House*, 126 S. Ct. at 2090 (Roberts, C.J., *dissenting*).

Fact finding and credibility determinations are so integral to the gateway innocence analysis that this Court in *House* took it upon itself to reverse the findings of the district court merely because it was "uncertain about" them. Here, the lower courts failed to make any innocence findings *at all*. The evidence establishing Petitioner's innocence underlies both his *Brady* and *Giglio* constitutional claims. As examined below, in part D, Petitioner's constitutional claims depend on the facts and credibility of the same evidence that shows that he is innocent. Had the lower courts applied *Schlup* and made the requisite factual and credibility determinations about "all the evidence," Petitioner could have demonstrated that "a constitutional violation probably resulted in the conviction of an innocent man." *See Schlup*, 513 U.S. at 327.

C. A Proper Gateway Innocence Analysis Informs and Improves a Habeas Court's Review of the Constitutional Issues

When habeas courts analyze substantial claims of innocence in accordance with this Court's precedent, the resulting factual and credibility determinations often bear upon the second step of the analysis -- petitioner's constitutional claims. A brief review of the "rare" instances where a Petitioner has shown his innocence demonstrates that constitutional issues are clarified when they are preceded by *Schlup* innocence analysis.

In *Schlup*, Lloyd Schlup, a Missouri prisoner, was convicted and sentenced to death for participation in the murder of a fellow inmate. *Id.* at 301. In his second habeas petition, Schlup claimed that (1) he was actually innocent and (2) his trial counsel was constitutionally ineffective under this Court's decision in *Strickland v. Washington*. This Court ordered the district court to consider "all the evidence" to determine if Schlup was actually innocent *before* it examined the merits of his constitutional claim. *Id.* at 331-32. The order of analysis proved important.

On remand, the district court conducted an evidentiary hearing, as ordered by this Court, and found that "more likely than not" Schlup was innocent in light of "all the evidence." *Schlup v. Delo*, 912 F. Supp. 448, 455 (E.D. Mo. 1995). The district court, then, granted constitutional relief based on the same evidence that proved Schlup's gateway innocence claim. *Schlup v. Bowersox*, 1996 WL 1570463, at *20 (E.D. Mo. May 2, 1996).

The district court noted that Schlup's evidence showing a *Strickland* constitutional violation was the "same evidence" that formed the basis of Schlup's innocence claim "which the [district] Court previously considered." *Id.*

Indeed, the district court cited the testimony of numerous eyewitnesses it found to be credible in Schlup's innocence evidentiary hearing to conclude that Schlup's trial counsel was constitutionally ineffective. *See id.* at 22-25. Thus, the district court's "conclusion that Petitioner satisfies the procedural actual innocence standard ... lends support to a conclusion that Petitioner also satisfies the less stringent *Strickland* standard." *Id.*

The ultimate resolution in *Schlup* shows that a proper gateway innocence analysis conducted in accordance with this Court's jurisprudence informs and improves a habeas court's constitutional analysis. Having conducted an evidentiary hearing to find that "all the evidence" showed that Schlup, "more likely than not", was innocent, the court also had the factual basis to conclude that Schlup's counsel was constitutionally ineffective.

In another case, *Cherrix v. Braxton*, the habeas court ordered an evidentiary hearing, noting that the facts of habeas petitioner's *Schlup* innocence claim would also establish that his trial counsel was constitutionally ineffective. 131 F. Supp. 2d 756, 770 (E.D. Va. 2001). In *Cherrix*, the victim was brutally raped and murdered in 1994. In 1997, petitioner was convicted of rape and murder based on DNA testing methods available at the time of the murder in 1994. Cherrix argued, and the court agreed, that an evidentiary hearing and DNA tests were required because the evidence underpinned both the petitioner's innocence claim and his claim that trial counsel had been constitutionally ineffective for failing to challenge and rebut the pathologist's testimony concerning the 1994 DNA test results when better methods existed at the time of trial.

D. Had the Lower Court Fulfilled its Role as Fact Finder and Examined Petitioner's Innocence Evidence, Petitioner Could Have Shown that "A Constitutional Violation Probably Resulted in the Conviction of an Innocent Man"

The Court of Appeals' bypass of the gateway inquiry resulted in a superficial review of Petitioner's constitutional claims. Had the courts below fulfilled its obligation to make factual and credibility findings about Petitioner Davis' innocence, Petitioner's alleged constitutional violations would have been apparent.

Petitioner submitted twenty-one affidavits to the district court showing he is innocent. Eight of the affidavits demonstrate not only Petitioner's innocence, but also that (1) the State withheld cumulatively material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and (2) that the police testified falsely and knew that witness testimony was false in violation of *Giglio v. United States*, 405 U.S. 150 (1972).

Under *Brady v. Maryland* and its progeny, the State is required to disclose material evidence to the defense. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). When police withhold evidence that could be used to attack the "integrity of the investigation" or "'carried within it the potential for the discrediting of the police methods employed in assembling the case,'" the State has violated *Brady*. *Id.* at 445-49. This Court has stressed that *Brady* evidence must be considered "collectively." *Id.* at 436.

In *Giglio v. United States*, the Supreme Court held that "the deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary standards of justice." 405 U.S. 150, 153 (1972).

Police knowledge of false testimony is imputed to the State and the prosecutors. *Kyles*, 514 U.S. at 438 (citing *Giglio*, 405 U.S. at 154). False testimony is deemed material for purposes of *Giglio* unless such testimony is "harmless beyond a reasonable doubt." *United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985).

The integrity and good faith of the police investigation is central to Petitioner's innocence and constitutional claims. Petitioner's innocence claim hinges, in part, upon the credibility of recanted trial witnesses. Many recanted witnesses explain that they testified falsely due to overly suggestive or intimidating police tactics. Likewise, the crux of Petitioner's *Brady* and *Giglio* claims is that police used "unreasonably suggestive" interrogation tactics to "pressure witnesses to make statements and/or identify Petitioner as the shooter." Petitioner's *Brady* claim alleges that the State failed to disclose such tactics and, had it done so, the bad faith of the investigation could have reasonably put the whole case in such a different light as "to undermine confidence in the outcome of ... Petitioner's trial." Petitioner's *Giglio* claim alleges State presented the testimony of witnesses that Savannah police officers knew to be false. Thus, Petitioner's innocence, *Brady* and *Giglio* claims all depend on the credibility of at least eight witnesses that the courts below never considered.

Although Petitioner requests only that this Court grant certiorari and remand to the district court to conduct the requisite innocence analysis, set out below is a brief discussion of several key affidavits that demonstrate how closely the gateway innocence analysis and the constitutional analysis are intertwined.

Larry Young's new affidavit is central to Petitioner's gateway innocence and *Brady* claims. At trial, Larry Young (the State witness who was assaulted with a pistol as Red

Coles harassed him) identified Petitioner as his attacker. Since it was undisputed that Officer McPhail's killer also assaulted Young, Young's trial testimony implicating Petitioner was key to the State's murder case. In his post-trial affidavit, Young states that he had initially told the police that he "*couldn't remember what anyone looked like or what different people were wearing ... [and] just couldn't tell who did what.*" After sustaining head injuries from a brutal assault, Young states that the police denied him medical treatment until "he told them what they wanted to hear," which consisted of answers the police "suggested" to him. The State left Mr. Young's initial statement out of its police report and never revealed that it had denied him medical treatment to elicit an identification of the shooter. Such revelations undermine the testimony of a key State witness and raise doubt as to the good faith and integrity of the investigation. When considered collectively with Petitioner's other affidavits, Young's new testimony is evidence not only that Petitioner is innocent but also evidence that the State withheld information about police tactics in violation of *Brady*.

Antoine Williams' new affidavit adds credence to Petitioner's innocence and *Brady* claims. At trial, Williams identified Petitioner as the assailant who struck Larry Young and killed Officer McPhail. The jury would have been troubled by Williams' in-court identification had they known that Williams, like Young, could not describe the shooter on the night of the crime and had repeatedly told the police that he "didn't know" what the shooter looked like because "it was dark, [his] windows were tinted, and [he] was scared." Had the habeas court conducted a gateway analysis, it would have determined that Williams' affidavit is credible evidence of innocence and that the State's failure to disclosure Williams' initial statement to the police that he "didn't know" what the shooter looked like supports Petitioner's alleged *Brady* violation.

Benjamin Gordon's new affidavit supports both Petitioner's innocence and *Brady* claims by casting doubt on the integrity and good faith of the police investigation. After Gordon testified as a State witness that he had never seen the shooter, the State introduced Gordon's police statement as affirmative evidence of Petitioner's guilt. Gordon's post-trial affidavit now describes how the police obtained his false statement. Gordon explains that the Savannah police "*came and dragged me from my house ... I was handcuffed and they put a nightstick in my neck. – at first, they called me a [expletive deleted] and told me that I had shot the officer. They told me that I was going to the electric chair. ... After four or five hours, they told me to sign some papers. I didn't read what they told me to sign, and they didn't ask me to.*"

If Gordon's affidavit is credible, the disclosure of the interrogation method used by the Savannah police, which is similarly described by Larry Young, Michael Cooper, Craig Young and D.D. Collins, would have been useful to impeach the content of Gordon's police statement.

Michael Cooper's new affidavit belies the integrity of the police tactics in ways that supports both Petitioner's innocence, *Brady* and *Giglio* claims. In his affidavit, Cooper declared that he "never told the police" what was contained in his police statement and that "[w]hat is written in that statement is a lie." The State failed to divulge that it had prepared Mr. Cooper's statement for him without reference to what he reported to the police. Although Cooper did not testify at trial, if Cooper's affidavit is credible, the disclosure of the police tactics would have been useful to impeach the credibility of the detective who had taken Mr. Cooper's statement -- Detective Ramsey.

Cooper's affidavit also raises a *Giglio* issue by calling into question the veracity of Ramsey's testimony. Cooper's

affidavit is irreconcilable with Detective Ramsey's testimony that "there were no suggestions made to any of the witnesses about who had in fact done the shooting." The truthfulness of Ramsey's testimony is also called into question by the new affidavits of Dorothy Ferrell, D.D. Collins and Jeffery Sapp.

The investigative techniques contained in Dorothy Ferrell's new affidavit support Petitioner's innocence, *Brady* and *Giglio* claims. Ferrell testified that she had identified Mr. Davis in a photographic line-up. In her affidavit, however, Ferrell admits that she lied at trial and that she never saw the shooting. Ferrell stated that Detective Ramsey showed her only one photograph, told her other witnesses had identified Mr. Davis and "*gave [her] the impression that [she] should say that Troy Davis was the shooter like the other witnesses had.*" If an evidentiary hearing shows that Ferrell's recantation is truthful, the State's failure to disclose the photo spread "technique" used with Ms. Ferrell will call into doubt her own testimony and the testimony of several other witnesses who identified Mr. Davis through a photographic line-up.[5]

As evidence of a *Giglio* violation, Ferrell's new affidavit directly conflicts with Detective Ramsey's trial testimony that he showed Ferrell multiple photographs before she identified Petitioner. Again, the credibility of Ramsey's testimony is also contradicted by Michael Cooper, D.D. Collins and Jeffery Sapp.

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[5] The Court of Appeals held that Ferrell's affidavit is not *Brady* evidence because Ferrell initiated contact with the district attorney by letter to seek a favor. Detective Ramsey secured Ferrell's photo identification of Mr. Davis on August 29, 1989. Ferrell contacted the district attorney on March 23, 1990. Thus, the State first contacted Ferrell to suggest that Mr. Davis was the shooter.

D.D. Collins testified at trial that Petitioner assaulted Larry Young. After trial, Collins swore that he told Detective Ramsey he had not "*see[n] Troy do nothing, and they kept telling me that I was going to jail as an accessory. . . . I told them that it was Red and not Troy who was messing with that man, but they didn't want to hear that. It was, 'Troy did this, Troy did that.' The detectives told me fine, have it your way, kiss your life goodbye, because you're going to jail . . .. I finally broke down and told them what they wanted to hear. They would tell me things that they said happened and I would repeat whatever they said . . . I just wanted to go home.*"

Mr. Collins' false testimony and police statement were a centerpiece of the State's case. Had the State disclosed that Collins' testimony was a product of police intimidation and suggestion, the importance of his testimony would have been drastically reduced and the integrity of the investigation would have been called into doubt. The State's failure to disclose Collins' interrogation technique supports Petitioner's *Brady* and innocence claims. Moreover, Collins' affidavit supports Petitioner's *Giglio* claim that Detective Ramsey lied at trial. Ramsey testified that he had not coerced or threatened Collins "in any way" and claimed that Collins "was real cooperative." Collin's new affidavit questioning the veracity of Detective Ramsey's testimony is corroborated by new evidence from Michael Cooper, Dorothy Ferrell and Jeffery Sapp. Alternatively, Detective Ramsey knew that Collin's testimony implicating Petitioner was false and failed to correct it in violation of *Giglio*.

Craig Young's trial testimony also lends support to Petitioner's innocence, *Brady* and *Giglio* claims. The State introduced Craig Young's police statement as evidence that Petitioner had gotten into an altercation prior to the shooting. Consistent with the description of the other eight witnesses, Young told the jury that his police statement was a product of

pressure from the police, explaining in his new affidavit that Savannah Detective Carl Ramey "told me when I came there that I knew all this stuff. Hey, man, he was like hollering at me, telling me stuff I already – I knew that I didn't know. So he was just like telling me, going step by step, telling me, you know." Detective Ramey disputed Young's account by testifying that he had not "put any words in Craig Young's mouth." If Young's affidavit is credible, the new evidence supports Petitioner's innocence by undermining the police investigation. The police tactics, withheld by the State and contradicted by Detective Ramey, also lend support to Petitioner's *Brady* and *Giglio* claims.

Jeffrey Sapp, another chief State witness, testified at trial that Petitioner confessed to him that he had shot Officer McPhail. In his post-trial affidavit, however, Sapp recants his testimony. Sapp explains that "*the police came to me and talked to me and put a lot of pressure on me to say 'Troy said this' or 'Troy said that.' They wanted me to tell them that Troy confessed to me about killing that officer. The thing is, Troy never told me anything about it. I got tired of them harassing me, and they made it clear that the only way they would leave me alone is if I told them what I wanted to hear. ... When it came time for Troy's trial, the police made clear to me that I needed to stick to my original statement, that is, what they wanted me to say.*"

Sapp's recantation undermines key State evidence of Petitioner's guilt and provides evidence that the State withheld evidence of interrogation methods that could have been used to attack the integrity of the investigation. Allowing Sapp to commit perjury when the interrogating police knew his testimony to be false is a *Giglio* violation.

The integrity of the police investigation is a common element to Petitioner's innocence, *Brady* and *Giglio* claims. Without the benefit of a properly conducted gateway

innocence analysis, the courts below could not gauge the credibility of the affiants and, therefore, could not properly assess whether the disclosure of the investigation tactics constituted a *Brady* violation -- i.e., whether the disclosure of police tactics could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435 -- or whether Savannah police Detectives testified falsely or knew State witness testimony to be false in violation of *Giglio*. A gateway innocence analysis conducted in conformity with *House* and *Schlup* would assess the credibility of the affiants listed above to determine if Petitioner is innocent.

To prove he is innocent, Petitioner must show that it is "more likely than not" that no reasonable would convict him in light of the new evidence. To show that the State violated *Brady*, Petitioner must show that had the State disclosed the suppressed evidence a different result at trial was "reasonably probable." If the gateway innocence analysis found the State witness recantations credible, the affiants' testimony could affect both the habeas court's innocence determination and *Brady* materiality finding in four critical respects.

First, disclosure of the initial, unrecorded police statements of Young, Williams, Sapp and Collins, all of which contradicted their trial testimony, would have provided powerful impeachment evidence for those key state witnesses. The impeachment of Young, Collins, Williams and Sapp would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense.

Second, disclosure of the police tactics used to secure the testimony of six of the eight witnesses discussed above corroborates issues raised at trial. Despite trial testimony of intimidating or overly suggestive police tactics from Craig Young and D.D. Collins, the jury had to consider the integrity of the police investigation without the corroborating accounts

of Larry Young, Antoine Williams, Jeffrey Sapp, Dorothy Ferrell, Benjamin Gordon and Michael Cooper. Indeed, the State was able to discount the testimony of Craig Young and D.D. Collins in its closing statement by arguing that "every one of the [witnesses who alleged police intimidation] had some connection with Troy Anthony Davis or the neighborhood he hangs out in." Larry Young, Antoine Williams, Benjamin Gordon, Michael Cooper and Dorothy Ferrell had no connection to Mr. Davis and no reason to lie for his benefit at trial. Had the State not suppressed the tactics used for these witnesses, the jury may have questioned the integrity of the investigation.

Third, disclosure of the police tactics used on the *eight* witnesses discussed above would have undermined the testimony of the two remaining eyewitnesses. This Court has held that the impeachment of one eyewitness may cause the jury to question the credibility of other witnesses. *Kyles*, 514 U.S. at 445. Here, the two State eyewitnesses who have not claimed police wrongdoing conformed their stories to the State's theory after Mr. Davis became the sole target of the investigation.[6] With evidence of intimidating and unduly suggestive police tactics used on eight other witnesses, reasonable jurors may have disregarded the trial identifications of the remaining two witnesses as another example of untrustworthy police intimidation or suggestion.

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[6] State witness Harriet Murray's preliminary hearing testimony and initial police statement implicated Red Coles as the shooter. Nonetheless, she identified Mr. Davis two years later at trial. Murray's affidavit also implicated Coles. Steven Sanders' police statement taken the night of the shooting stated that he would not "recognize the shooter" contradicted his testimony two years later when he identified Mr. Davis in court.

Lastly, damage to the State's case would not have been confined to eyewitness evidence, for disclosure of the investigation tactics used by police raised opportunities to attack the thoroughness and the good faith of the investigation. *See id.* The collective evidence of untrustworthy police tactics would have created such skepticism of the State's eyewitnesses that reasonable jurors may question the reliability of the investigation in failing to investigate Red Coles. In light of the interrogation tactics discussed above, the failure of the police even to consider Red Coles a suspect, include his picture in the eyewitness photo spread or search his house for the murder weapon casts doubt on the outcome of Petitioner's trial. Thus, revelation of the police investigative tactics could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

CONCLUSION

The petition for a writ of certiorari should be granted, or, remanded with an order to the district court to consider Petitioner's innocence evidence to determine if it may consider the merits of his otherwise-barred constitutional claims.

Respectfully submitted,

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